

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Petition of Autotel for Preemption	)	WC Docket No. 04-311
Pursuant to Section 252(e)(5)	)	

**SBC’S OPPOSITION TO AUTOTEL’S PETITION**

The Commission should reject Autotel’s *Petition for Preemption*.<sup>1</sup> The sole basis for the dismissal of Autotel’s state arbitration petition was its failure to comply with discovery requests and its refusal to obey state commission procedural orders. Dismissal of a state arbitration proceeding for a party’s failure to adhere to basic procedural obligations does not warrant Commission preemption.

Section 252(e)(5) of the Act only permits the Commission to preempt the jurisdiction of a state commission when a state commission "*fails to act* to carry out its responsibility under [section 252]."<sup>2</sup> Under the Commission's rules, the party seeking preemption bears the burden of proving that the state commission has failed to act.<sup>3</sup> In the *Local Competition Order*, the Commission concluded that it would not take an "expansive view" of what constitutes a state commission's "failure to act" for purposes of section 252(e)(5).<sup>4</sup> Rather, the Commission limited the instances in which § 252(e)(5) preemption is appropriate to those in which “a state

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<sup>1</sup> Petition of Autotel Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Public utilities Commission of Nevada Regarding Arbitration of an Interconnection Agreement with SBC Nevada, *Petition for Preemption*, WC Docket No. 04-311 (July 28, 2004).

<sup>2</sup> 47 U.S.C. § 252(e)(5). (Emphasis added.)

<sup>3</sup> 47 C.F.R. § 51.803(b); *see also* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, CC Docket No. 96-98, *et. al.*, FCC 96-325 ¶ 1285 (“Local Competition Order”)(“The Commission will place the burden of proof on parties alleging that the state commission has failed to respond to a request for mediation or arbitration within a reasonable time frame.”)

<sup>4</sup> *Id.*

commission *fails to respond*, within a reasonable time, to a request for mediation or arbitration, or *fails to complete* an arbitration *within the time limits* of section 252(b)(4)(C)."<sup>5</sup> In this instance, it is clear that the Public Utilities Commission of Nevada ("Nevada Commission") did not fail to respond to Autotel's request for arbitration and did not fail to complete the arbitration within the deadlines set forth in the Act. Accordingly, Commission preemption is unwarranted.

This is plainly not an instance in which a state commission failed to act upon a request for arbitration. To the contrary, in response to Autotel's arbitration petition, the Nevada Commission docketed the matter, issued a public notice, held pre-hearing conferences, issued a procedural schedule, and ruled on various pre-hearing issues.<sup>6</sup> And by granting SBC's motion to dismiss, the Commission issued a final decision as to Autotel's arbitration request. In short, in no sense did the Nevada Commission fail to respond to Autotel's request for arbitration.

Nor is this an instance in which the Nevada Commission failed to complete the arbitration within the time limits of § 252(b)(4)(C). To be sure, the Nevada Commission's order granting SBC's motion to dismiss was issued nearly two years after Autotel filed its initial request for arbitration. However, SBC's motion to compel was filed one month after Autotel filed its arbitration request with the Nevada Commission.<sup>7</sup> Only one month after that, Autotel (jointly with SBC) specifically requested that the Nevada Commission hold the arbitration in abeyance so that negotiations could continue.<sup>8</sup> Not until February 6, 2004, did Autotel request

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<sup>5</sup> *Id.* (Emphasis added.)

<sup>6</sup> *See Nevada Commission Comments*; see also Petition of Autotel for Arbitration of an Interconnection Agreement with Nevada Bell Telephone Company Pursuant to section 252 of the Telecommunications Act of 1996, *Order Granting Motion to Dismiss*, Public Utilities Commission of Nevada Docket No. 02-8016 (July 19, 2004) ("Nevada Order"); Exhibit C to Autotel's *Petition for Preemption*.

<sup>7</sup> *See Nevada Commission Comments* at 1.

<sup>8</sup> *See id.* A year later, Autotel (again jointly with SBC) confirmed that negotiations were ongoing and that the proceeding should be held in abeyance. *Nevada Order* at ¶ 13.

that the Nevada Commission recommence the arbitration proceedings.<sup>9</sup> And from February 2004 through July 2004 when the Nevada Commission issued its order, the proceedings were prolonged as a result of Autotel's failure to comply with discovery. Accordingly, any delay in the Nevada Commission's issuance of its order disposing of the proceeding was solely Autotel's responsibility. It would be patently inappropriate for the Commission to reward Autotel by now concluding that the Nevada Commission's patience in dealing with Autotel's dilatory tactics constitutes failure of the Nevada Commission to act within the deadlines proscribed by the Act.<sup>10</sup>

In short, this is neither an instance in which the Nevada Commission failed to respond to Autotel's arbitration request or to complete its arbitration proceeding within the statutory deadline. This is simply a case in which a state commission dismissed a proceeding for failure of a party to comply with the most basic procedural requirements. Under the plain terms of § 252(b)(4)(C), preemption is inappropriate.

That conclusion is fully supported by prior Commission decisions interpreting the scope of § 252(b)(4)(C), as well as the D.C. Circuit's decision in *Global Naps v. FCC*, 291 F.3d 832 (D.C. Circuit 2002). In its petition, Autotel fails to mention, let alone address, a single one of the Commission's prior decisions or the *Global Naps* decision, or any authority other than § 252 of the Act.<sup>11</sup> Those decisions fully support the conclusion that preemption is unwarranted in this

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<sup>9</sup> *Id.* at ¶ 14.

<sup>10</sup> The Commission has held that a state commission does not fail to act under § 252(a)(6) when it does not substantively resolve an issue that a party fails to identify pursuant to § 252(b)(2) or a state commission's procedural rules. See Petition of MCI for Preemption Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, *Memorandum Opinion and Order*, 12 FCC Rcd. 15,594, FCC 97-166 (Sept. 26, 1997).

<sup>11</sup> Autotel's pleading falls well short of the Commission's rule requiring that the party filing a petition pursuant to § 252(b)(4)(C) state "with specificity the basis for the petition." 47 C.F.R. § 51.803. See also *Local Competition Order* ¶ 1285 ("We believe that parties should be required to file a detailed written petition, backed by affidavit, that will, at the outset, give the Commission a better understanding of the issues involved and the action, or lack of action, taken by the state commission. . . . A detailed written petition will facilitate a decision about whether the Commission should assume jurisdiction based on section 252(e)(5).")

instance.

As the attachments to Autotel's *Petition for Preemption* make clear, the Nevada Commission disposed of the arbitration proceeding because Autotel failed to respond to discovery, "repeatedly failed to provide information directly related to the one issue it presented for Arbitration. . . [and] also has not addressed the additional issues raised by SBC Nevada."<sup>12</sup> More broadly, the Nevada Commission found that Autotel "ignore[d] the Presiding Officer's Order, the [Nevada] Commission's regulations, and Autotel's requirements under 47 U.S.C. § 252."<sup>13</sup> Accordingly, based on its own procedural authority under Nevada law (*e.g.*, Nevada Administrative Code § 703.680 allowing dismissal of actions as a permissible sanction for refusal to comply with discovery orders), as well as the authority conferred upon it by § 252 of the Act, the Nevada Commission dismissed Autotel's arbitration petition as a result of Autotel's failure to comply with fundamental procedural requirements. In short, Autotel's failure to comply with discovery and other basic procedural obligations "gave the [Nevada Commission] little choice but to take the action it did and dismiss Autotel's Petition for Arbitration."<sup>14</sup> Such action prohibits the Commission from preempting the Nevada Commission under § 252(b)(4)(C).

The Commission and the D.C. Circuit have addressed the issue of the applicability of § 252(b)(4)(C) to state procedural determinations in § 252 arbitrations. In *Global Naps*, the D.C. Circuit generally held that, "[e]ven if the state agency's dismissal was premised on faulty or incomprehensible legal reasoning, it nonetheless" constitutes final action disposing of an

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<sup>12</sup> *Nevada Order* ¶ 35.

<sup>13</sup> *Id.*

<sup>14</sup> *Nevada Commission Comments* at 3.

arbitration request.<sup>15</sup> Following the *Global Naps* decision, the Commission has held that review of state commission orders disposing of arbitration issues on procedural grounds is impermissible under § 252(b)(4)(C). Thus, in its *Starpower Communications* decision,<sup>16</sup> the Commission held that “a state commission carries out “its responsibility [under section 252]” when it resolves the merits of a section 252 proceeding or *dismisses such a proceeding on . . . procedural grounds.*”<sup>17</sup> In such instances, “a state commission does not “fail to act” when it dismisses or denies an arbitration petition on the ground that it is procedurally defective[.]”<sup>18</sup> Furthermore, the D.C. Circuit has agreed that it was reasonable for the Commission to conclude that “§ 252(e)(5) does not empower [the Commission] to look behind a state agency’s dismissal of a carrier’s claim to evaluate the substantive validity of that dismissal.”<sup>19</sup> For this very reason, in its *Supra Telecommunications* decision,<sup>20</sup> the Commission rejected “Supra’s argument that [the Commission] must preempt because the Florida Commission “failed to act” by violating Supra’s procedural rights under the Act, Commission precedent, or Florida law.”<sup>21</sup> Rather, the Commission held, “any grounds for seeking review of the Florida Commission’s action - whether alleging substantive *or procedural flaws* - are properly addressed to a federal district court

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<sup>15</sup> *Global Naps, Inc. v. FCC*, 291 F.3d 832, 837 (D.C. Cir. 2002).

<sup>16</sup> *Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, Memorandum Opinion and Order*, 15 FCC Rcd. 11,277, FCC 00-216 ¶ 8 (June 14, 2002). (Emphasis added.)

<sup>17</sup> *Id.* ¶ 8 (Emphasis added.)

<sup>18</sup> *Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.’s Petition for Arbitration with Ameritech Illinois Before the Illinois Commerce Commission, et. al., Memorandum Opinion and Order*, 13 FCC Rcd. 1755, FCC 97-362 ¶ 33 (Oct. 8, 1997).

<sup>19</sup> *Global Naps*, 291 F.3d at 833.

<sup>20</sup> *Petition of Supra Telecommunications & Information Systems, Inc. (“Supra”), Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Florida Public Service Commission, Memorandum Opinion and Order*, 17 FCC Rcd. 22, 884, DA 02-3151 (Nov. 14, 2002).

<sup>21</sup> *Id.* ¶ 13.

pursuant to section 252(a)(6) of the Act.”<sup>22</sup>

The Commission’s conclusion applies with similar force in this instance. Indeed, based on the language of the Act and the prior decisions of the Commission and the D.C. Circuit, there is no question that preemption under § 252(a)(6) is unwarranted. The Nevada Commission disposed of Autotel’s arbitration request because of Autotel’s failure to comply with the Commission’s discovery and other procedural orders. Such action is clearly not a failure to act under § 252(a)(6) and does not warrant Commission preemption. The Commission should deny Autotel’s *Petition for Preemption*.

Respectfully Submitted,

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August 24, 2004

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<sup>22</sup> *Id*; see also *Global Naps*, 291 F.3d at 833-34 (“It does not matter whether the state agency’s position is correct on the merits. Rather, as the FCC found, what matters is that DTE did not fail to act, so the federal Commission has no basis upon which to preempt the regulatory authority of the state agency. GNAPs’ remedy lies not in FCC preemption, but rather in judicial review of DTE’s order, whether in federal or in state court.”)